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IN THE

Supreme Court of the United States

October Term, 1965

No. 66

ALBERT A. LIST,

Petitioner,

against

LOUIS C. LERNER, individually and as doing business under the firm name and style of LERNER & COMPANY, and as a Director of FASHION PARK, INC.,

JEROME LEWINE, EDMUND W. FITZGERALD, ARTHUR S. NEUMARK, ROBERT PARKES BARUCH, LEWIS D. RAABIN, E. MILO GREENE, STANLEY HESSE, WALTER CAMPBELL GIBSON, HENRY A. ZOELLER, ROBERT POLLAK, JEROME LEWINE, JR., ALVIN SCHONFELD, ARTHUR MORRIS, GERSON D. LUBIN, WILLIAM P. GREEN, MORRIS HOFFENBERG, NORMA P. LEWINE, JACOB SCHONFELD, MARINA BARUCH DOYLE, LEO M. C. OLIVER, JULIAN BLASS, FLORENCE S. CLAYTON, HATTIE G. MORRIS and HELEN F. SPOONER, doing business under the firm name and style of H. HENTZ & CO., a co-partnership, and WILLIAM P. GREEN, individually,

Respondents,

FASHION PARK, INC., *et al.*,

Defendants.

BRIEF OF RESPONDENTS H. HENTZ & CO. and WILLIAM P. GREEN IN OPPOSITION

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IN THE

Supreme Court of the United States

October Term, 1964

No. 1027

ALBERT A. LIST,

Petitioner,

against

LOUIS C. LERNER, individually and as doing business under the firm name and style of LERNER & COMPANY, and as a Director of FASHION PARK, INC.,

JEROME LEWINE, EDMUND W. FITZGERALD, ARTHUR S. NEUMARK, ROBERT PARKES BARUCH, LEWIS D. RAABIN, E. MILO GREENE, STANLEY HESSE, WALTER CAMPBELL GIBSON, HENRY A. ZOELLER, ROBERT POLLAK, JEROME LEWINE, JR., ALVIN SCHONFELD, ARTHUR MORRIS, GERSON D. LUBIN, WILLIAM P. GREEN, MORRIS HOFFENBERG, NORMA P. LEWINE, JACOB SCHONFELD, MARINA BARUCH DOYLE, LEO M. C. OLIVER, JULIAN BLASS, FLORENCE S. CLAYTON, HATTIE G. MORRIS and HELEN F. SPOONER, doing business under the firm name and style of H. HENTZ & CO., a co-partnership, and WILLIAM P. GREEN, individually,

Respondents,

FASHION PARK, INC., *et al.*,

Defendants.

BRIEF OF RESPONDENTS H. HENTZ & CO. and WILLIAM P. GREEN IN OPPOSITION

Opinions Below

The Opinion of the District Court for the Southern District of New York is reported at 227 F. Supp. 906. The Opinion of the Court of Appeals for the Second Circuit is reported at 340 F. 2d 457.

Jurisdiction

The judgment of the Court of Appeals affirming the decision of the Trial Court was entered on January 4, 1965. The petition for a writ of certiorari was filed March 30, 1965. Petitioner invokes the jurisdiction of this Court under 28 USC §1254 (1).

The Question Presented

Should this Court invoke its certiorari jurisdiction in this case:

(a) Where the Court of Appeals found that factual determinations of the Trial Court were fully supported by the record and were not "clearly erroneous," and

(b) Where the decision of the Court of Appeals is not in conflict with any decisions of this Court or other Circuit Courts of Appeals and does not raise any substantial Federal question.

Statement of the Case

Petitioner, who purchased 5,100 shares of common stock of Fashion Park, Inc. in January, 1959 and sold them at a profit of over $25,000 on November 17, 1960, brought this action against several defendants, including H. Hentz & Co. ("Hentz"), a brokerage firm which acted as broker for the purchasers of petitioner's stock, and William P. Green ("Green"), a general partner of Hentz. His claim was that the defendants violated Section 10(b) of the

Securities Exchange Act of 1934 (15 USC §78j(b)) and Rule 10b-5 promulgated thereunder by not disclosing the following facts to him at the time he sold his Fashion Park, Inc. common stock:

1. That respondent Louis Lerner, the purchaser of 4,300 shares of petitioner's stock, was a director of Fashion Park, Inc.

2. That on November 4, 1960, the directors of Fashion Park, Inc. adopted a resolution to the effect that the Company should be sold or merged; and

3. That Hat Corporation of America, which offered to purchase all shares of Fashion Park, Inc. common stock at $50 per share, pursuant to an agreement made with the controlling shareholders of Fashion Park, Inc. in February, 1961, had expressed an interest in Fashion Park, Inc. prior to November 17, 1960.

In the Court of Appeals petitioner advanced for the first time the argument that the purchasers' willingness to buy his stock at $18.50 per share constituted a representation that the shares were then worth $18.50 per share, when they were worth more.

Petitioner sought damages of $160,150, the difference between the price ($18.50 per share) at which he sold his Fashion Park, Inc. common stock and the price ($50 per share) offered for all such shares by Hat Corporation of America pursuant to the February 1961 agreement.

The facts, which are largely undisputed, are cogently set forth in the opinion of the Court of Appeals (App. Pet.

3-5)* and in respondent Lerner's brief in opposition and shall not be repeated here. We will restrict ourselves to noting that the Trial Court found that, at the time petitioner sold his stock, Hentz had no knowledge of the November 4, 1960 resolution or the pre-November 17, 1960 interest of Hat Corporation of America (P. App. 22a) and to pointing out the numerous unsupported and inaccurate statements in petitioner's statement of the case.

Petitioner asserts that "defendants" purchased petitioner's stock. Hentz did not; it acted solely as broker for the purchaser (P. App. 7a, App. Pet. 5).

Petitioner charges that "defendants arranged to sell" petitioner's stock to Hat Corporation of America at $50 per share approximately three weeks after he sold his stock. Hentz and Green had absolutely no role in the transaction between Fashion Park, Inc. and Hat Corporation of America or the negotiations leading to that transaction (which were not even undertaken until after November 17, 1960). The agreement between these parties was not reached until February, 1961 (not December, 1960) and Hentz and Green had no knowledge of the purchase price until February, 1961 (R. App. 119a-125a, 138a-140a, 144a-145a).

Petitioner alleges that defendants had certain inside information which they failed to disclose to him, which nondisclosure induced him to sell his stock. The record is undisputed that Hentz and Green knew only that Lerner was

* References herein will be made as follows: Petitioner's Appendix—"P. App.", Respondents' Appendix—"R. App.", Appendix to Petition for writ—"App. Pet.", Petition for writ—"Pet."

a director of Fashion Park, Inc. and both the Trial Court and the Court of Appeals found that the other facts to which petitioner alludes were not material facts. As to Lerner's identity, it was found that petitioner would have sold even if he knew that Lerner was a purchaser (P. App. 16a, App. Pet. 12-13).

Petitioner now asks this court to review these as well as the other factual determinations which the Trial Court resolved in favor of respondents and which the Court of Appeals found to be fully supported by the record.

ARGUMENT

I

The determination by the Court of Appeals is not in conflict with decisions of this Court or with decisions of Courts of Appeals of other Circuits, does not raise any substantial Federal question and is clearly correct.

The Court of Appeals held that the common law elements of "materiality" and "reliance" are carried over into civil fraud actions under Rule 10b-5 and that a plaintiff, to prevail in such an action, must establish both elements. The court defined these terms as follows:

"'Materiality' encompasses those facts which 'in reasonable and objective contemplation might affect the value of the corporation's stock or securities * * *'" (App. Pet. 10).

The test of reliance is "* * * whether the plaintiff would have been influenced to act differently than he did act if the defendant had disclosed to him the undisclosed fact * * *" (App. Pet. 11).

To support these conclusions the Court of Appeals relied upon *Reed* v. *Riddle Airlines*, 266 F. 2d 314, 319 (5 Cir. 1959); *Kohler* v. *Kohler Co.*, 208 F. Supp. 808, 823 (E. D. Wis. 1962), *aff'd*, 319 F. 2d 634 (7 Cir. 1963); *Mills* v. *Sarjem Corporation*, 133 F. Supp. 753, 767 (D. N. J. 1955); *Speed* v. *Transamerica Corp.*, 5 F. R. D. 56, 60 (D. Del. 1945); *accord*, III Loss, Securities Regulation 1765-66; *Kardon* v. *National Gypsum Co.*, 73 F. Supp. 798, 800 (E. D. Pa. 1947).

Petitioner argues that to require a plaintiff to prove reliance (i.e., that there is a causal connection between the alleged wrong and his injury) destroys the intent of the Securities Exchange Act of 1934 and is contrary to decisions of this Court and the Court of Appeals for the Third Circuit (Pet. 4-5, 12-13). He is wrong.

The Securities Exchange Act of 1934 does not expressly provide for civil suits based on violations of Section 10b or Rule 10b-5; this remedy was created by the courts (*Kardon* v. *National Gypsum Co., supra;* III Loss, Securities Regulation, 1761 *et seq.*). Thus, there is absolutely no basis for petitioner's assertion that requiring a plaintiff to establish his reliance on an alleged misrepresentation or omission is contrary to Congressional intent. Further, when Congress intended to eliminate reliance as an element of a civil cause of action based on the Federal securities laws, it did so: Section 12(2) of the Securities Act of 1933

(15 USC 77l(2)) makes any person, who sells a security by means of a prospectus or oral communication which includes an untrue statement of a material fact or omits to state a material fact, liable to the buyer, unless the seller can establish that he did not know and in the exercise of reasonable care could not know of such untruth or omission. Petitioner's reference (Pet. 12) to page 1702 of Professor Loss' treatise in which it is stated that reliance need not be proven deals with Section 12(2) and not with Section 10(b) or Rule 10b-5.

Similarly, *Securities and Exchange Commission* v. *Capital Gains Research Bureau, Inc.*, 375 U. S. 180, 84 S. Ct. 275 (1963) has no bearing on the case at bar. That case involved an attempt by the SEC to enjoin "scalping" by a registered investment advisor. It is obvious that in such a proceeding, or in administrative disciplinary proceedings brought by the Commission to prevent or punish unlawful conduct, rather than to compensate persons damaged by such conduct, it is immaterial whether anyone was in fact victimized, and there is no need to show any causal connection between the act complained of and the injury resulting therefrom. Thus, petitioner's reliance on *Charles Hughes & Co., Inc.* v. *SEC*, 139 F. 2d 434 (2 Cir. 1943), other cases involving SEC disciplinary proceedings and pages 1438-1439 of Professor Loss' treatise is equally misplaced.

Further, the Court of Appeals decision in this case is not in conflict with *Speed* v. *Transamerica Corp.*, 99 F. Supp. 808 (D. Del. 1951), *Kardon* v. *National Gypsum Co., supra;* 83 F. Supp. 613 (E. D. Pa. 1947) or *Strong* v. *Repide*, 213 U. S. 419, 29 S. Ct. 521 (1909).

In *Speed,* plaintiffs expressly alleged that they relied upon the untrue statements there involved (page 812) and the decision in an earlier phase of the same case (5 F. R. D. 56, 60) shows that a class action was allowed because the court was convinced that there was such reliance by all of plaintiffs. The Court of Appeals here did not impose a more stringent test.

In *Kardon,* the court apparently found that plaintiffs did rely on an express misrepresentation by defendants (83 F. Supp. at 614) and any statement to the contrary is, at best, dictum.

Similarly, in *Repide,* while the sole issue before this Court was whether a corporate insider was under a duty to disclose certain information to the seller of stock in that corporation, this Court did point out that there was ample evidence in the record to establish that because of defendant's concealing certain facts plaintiff was induced to sell her stock when otherwise she would not have done so (213 U. S. at 428-30). This is but another way of saying that there was reliance.

It is seen, therefore, that the principles enunciated by the Court of Appeals do not vitiate the purposes of the Securities Exchange Act of 1934, are not in conflict with any decisions of this Court or of any other Circuit Court, and are in fact clearly correct.

II

The findings of fact made by the Trial Court and affirmed by the Court of Appeals are amply supported by the record and should not be subject to further review.

Much of the petition is devoted to attacks on the factual determinations made by the Trial Court and affirmed by the Court of Appeals (e.g., pages 8, 9, 11, 12, 16-18, 18-19, 20 and 22-24). However, factual issues which have been passed upon by two courts should not again be reviewed by this Court (*Graver Tank & Mfg. Co., Inc.* v. *Linde Air Products Co.*, 336 U. S. 271, 69 S. Ct. 534 (1949)). There this Court held:

> "A court of law, such as this Court is, rather than a court for corrections of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." (citing many cases) 336 U. S. at 275, 69 S. Ct. at 538.

Here, no such error is or can be shown for the findings of fact made below are more than amply supported by the record.

Thus, the Trial Court concluded that petitioner would have sold his Fashion Park, Inc. stock even if he knew that Lerner, a Fashion Park director, was one of the buyers. It based this result on its findings (upheld by the Court of Appeals) that

> "* * * [P]laintiff is an experienced and successful investor in securities; that he actively solicited the sale

to defendants; that he did not ask his broker whether any insiders were bidding for stock in the corporation; that his broker knew two directors were bidding but did not think it necessary to inform plaintiff of this; that the only restriction plaintiff placed on his broker related to price; and that his broker suggested that five points would be a nice profit, to which plaintiff agreed. From these facts, the trial court presumably inferred that plaintiff was so desirous of 'the potential five point profit he would make' and so reliant on knowledge acquired through 'his many dealings in the securities field' that the identity of the buyer would have been of little or no concern to him." (App. Pet. 12-13)

Similarly, the Trial Court concluded that the adoption of the November 4, 1960 resolution and the setting in which it occurred were not material facts that should have been disclosed to petitioner. This result was based in part "* * * on the undisputed facts that at the time the resolution was adopted the Fashion Park directors only had before them the statement of the union manager that he knew of some unidentified person who would be interested in buying Fashion Park; that by the time plaintiff sold his stock on November 17, 1960 nothing more had occurred except that the president of Fashion Park had learned the name of the potential purchaser; and that within two weeks after he bought plaintiff's stock defendant Lerner disposed of part or all of his interest in 3137 of his 4300 shares at an average profit of only about $1 per share. The trial court presumably inferred from these facts that the prospects for 'a sale of Fashion Park' and for a sale at a price 'profitable to shareholders,' insofar as Lerner and the other defendants apprehended them to be at the time they

purchased plaintiff's stock, were too remote to have influenced the conduct of a reasonable investor." (App. Pet. 13-14)

Again the Court of Appeals upheld these determinations. *James Blackstone Memorial Library Assn.* v. *Gulf, Mobile & Ohio R. R. Co.*, 264 F. 2d 445 (7 Cir., 1959), cert. denied 361 U. S. 815 (1959); *Kohler* v. *Kohler Co.*, *supra.*

We submit that petitioner should not be heard now to argue that if his evidence (rejected by two courts) had been accepted he could prevail. (Fed. R. Civ. Proc. 52 (a))

III

The Court of Appeals correctly declined to consider the newly raised issue of price misrepresentation and, in any event, there was no evidence to support such issue.

Neither plaintiff's complaint nor the pre-trial order defining the issues for trial in this action made the slightest mention of any claim that the purchase of petitioner's stock at $18.50 per share constituted an implied representation that his stock was worth that price on the day of sale or that such a representation was false (R. App. 108a-109a). Similarly, petitioner made no attempt either at the trial or at its conclusion to amend his pleadings to allege such a charge (see Fed. R. Civ. Proc. 15(b)). In these circumstances, the Court of Appeals correctly declined to pass on such issue, raised for the first time on appeal.

In addition, there is no evidence in the record to show that on November 17, 1960, the day petitioner sold his stock, the value of that stock was other than $18.50 per share. The record is clear that petitioner, through his broker, offered his stock in the open market at a price of $20 per share on November 16, 1960 and, after negotiations, sold those shares at a price of $18.50 on the following day. On those days, the market price for Fashion Park stock as shown by the National Quotation Bureau sheets (P. App. 101a) was $16-$19 and $16-$18, respectively.

Notwithstanding petitioner's failure to raise this issue on trial, he now alludes to three so-called facts which he claims the Trial Court could have relied upon to find the "fair value" of petitioner's stock (Pet. 23-24): the $50 per share received by the Fashion Park shareholders from Hat Corporation of America under the agreement of February, 1961, the book value of the stock, and Fashion Park's annual report for 1959. The latter two facts were fully known to petitioner when he sought to sell his stock (R. App. 192a, 198a), and the price which Hat Corporation of America was offering was not disclosed until February, 1961 and was not known by Hentz and Green until that time (R. App. 233a-234a, 238a-240a).

It follows necessarily that this claim is at best a belated makeweight devoid of merit.

Conclusion

The decisions below, which were based on findings of fact fully supported by the record, are consistent with the purposes of the Securities Exchange Act of 1934 and decisions of this Court and other Circuit Courts. The petition for certiorari should be denied.

Respectfully submitted,

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